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IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-549 and 72-550

SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, *et al.*,
Petitioners,

v.

STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

CAROLYN BRADLEY, *et al.*,
Petitioners,

v.

STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE JEWISH RIGHTS COUNCIL AS *AMICUS CURIAE*

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BRIEF OF THE JEWISH RIGHTS COUNCIL AS *AMICUS CURIAE*

Interest of the *Amicus*

The Jewish Rights Council, *Amicus*, was founded in 1971 for the purpose of ensuring and promoting equality

of all persons before the law, and in that manner to strengthen and preserve the security and constitutional rights of Jews in America through the preservation of the equal rights of all Americans. The Jewish Rights Council believes that the welfare of Jews in the United States is inseparably related to and dependent upon the equality of treatment of all Americans, regardless of race, religion, creed, or ethnic background. The membership of the Jewish Rights Council includes over one hundred Rabbis from over thirteen States, representing Orthodox, Conservative and Reform Congregations. The leadership of the Jewish Rights Council includes Rabbis who marched with the late Reverend Martin Luther King in Selma, Alabama, for the equality of rights of all persons before the law.

The instant case raises an important issue under the Equal Protection Clause of the Fourteenth Amendment, involving the imposition by a Federal District Court upon a sovereign State and its School Boards of racial quotas of pupils in public schools through the drastic remedy of requiring the amalgamation of a city school system with two neighboring suburban county school systems into a single school system, together with a lottery plan for the cross-transportation of white students from the suburban school districts into the city schools and of black students from the city into the suburban schools.

Public education has been one of the keystones for the unprecedented success of the Jew and other minority groups in America, and therefore the Jewish Rights Council has a particular interest in quality, as well as equality,

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n public educational facilities. Being composed of mem-
ers of an historically persecuted minority, the membership
f the Jewish Rights Council is especially sensitive to any
nd all forms of discrimination based upon race, religion,
r ethnic background. On the other hand, the Jewish Rights
Council firmly believes that it is extremely important for
he preservation of our American way of life, with its con-
omitant "American dream," that the rights of one group
f persons shall not be sacrificed in the name of the promo-
ion of another minority group. Therefore, the interest of
micus herein is to oppose the use of the Equal Protection
lause of the Constitution to require racial quota systems
n the schools or in any other public function in this coun-
ry. For it is but a short step from the concept of a "viable
acial mix" (District Court below, 338 F. Supp. at 230) to
he infamous *numerus clausus.*

On the other hand, the Jewish Rights Council wishes to
nake it crystal clear that there must never be the slightest
etreat from the principle of *Brown* v. *Board of Education,*
47 U.S. 483 (1954), that a State or its agents may not deny
he equal access to a public school (or other facility) to any
erson on the basis of race, religion, ethnic background or
reed. In the words of the late Mr. Justice Frankfurter:

> "Color alone cannot bar a child from a public school."
> *Cooper* v. *Aaron,* 358 U.S. 1, 25 (1958) (concur. op.).

This is the promise of *Brown* from which there must be no
etreat anywhere in our Nation.

Consent to Filing

This *Amicus* Brief is being filed with the consent of all parties to the proceeding.

Opinions Below

The opinion of the District Court is reported at 338 F. Supp. 67; and the opinion of the Court of Appeals is reported at 462 F. 2d 1058. Both opinions are reported under the style of *Bradley* v. *School Board of Richmond, Virginia,* and will be referred to hereinafter as "*Bradley* below."

Statement of the Case

This litigation originally arose in 1961 when the original plaintiff black parents of public school children brought a class action to desegregate the public schools in the City of Richmond, then operating a dual system of admission to public schools. By the time of the beginning of the school year 1966-1967, however, and thereafter, freedom-of-choice plans were in operation in each of the school systems involved in the present case, namely, the City of Richmond, the County of Chesterfield and the County of Henrico. *Bradley* below, 338 F. Supp. 67, 70-71, 169, 173; 462 F 2d 1058, 1061.

In March of 1970, the plaintiff parents in the City of Richmond filed a Motion for Further Relief, being dissatisfied with the racial balance in the City schools under the freedom-of-choice plan. After a hearing in the District Court, an Interim plan was ordered for the 1970-1971 school year, involving the use of pupil transportation at

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the secondary level of schools only, due to the lack of sufficient transportation facilities to implement the "Foster plan" proffered by plaintiff parents. In approving the Interim plan, the District Court noted that the "Foster plan" would, if adopted, "create a unitary system" and "do much toward the thwarting of resegregation." *Bradley* v. *School Board of Richmond*, 317 F.Supp. 555, 576 (E.D. Va. 1970). In any event, it was the Interim plan which actually went into effect for the 1970-1971 school year in Richmond.

In December of 1970, the plaintiff school parents filed an amended complaint seeking to join the predominantly white school systems of both Chesterfield and Henrico Counties with the majority black school system of the City of Richmond into a tri-system-wide assignment of pupils, teachers, school plant, transportation facilities and all other incidents of school operation. Prior to a hearing on this tri-system-wide plan ("metropolitan plan"), a hearing was held in March of 1971 on the question of the 1971-1972 school year for the City of Richmond. As a result, the District Court ordered into effect the City of Richmond School Board's own plan 3, a modified Foster plan, for the 1971-1972 school year with the observation that either the Foster plan or the City's own plan 3 would "fulfill the School Board's legal duty. * * *" *Bradley* v. *School Board of Richmond*, 325 F.Supp. 828, 846 (E.D. Va. 1971).

As a result of the implementation of the Interim plan for the 1970-1971 school year in Richmond, approximately 3,000 out of a total of approximately 20,000 white pupils left the public schools in the City of Richmond, a 300% increase in normal white attrition. Again, after the im-

plementation of the City's own plan 3, an even greater attrition of white pupils was suffered by the City's public school system in 1971-1972. Consequently, the overall school population in the Richmond public school system became even more predominantly black than the extent of 63.8% which had held for the 1970-1971 school year. (*Bradley* below, 338 F.Supp. at 103, 185, 240-242.)

In view of the failures of the Interim plan as well as the City's own plan 3 to achieve a racial balance in the Richmond City public school system, and in view of the inability of achieving quotas of less than 40% black pupils in every Richmond City school (by reason of the white attrition), on January 5, 1972, after plan 3 had been in effect for a few months, the District Court ordered that the City of Richmond and the Counties of Chesterfield and Henrico implement a metropolitan consolidation plan in time for the 1972-1973 school year. That plan required the consolidation of the by then predominantly (over 65%) black schools of the City of Richmond with the stable predominantly (over 90%) white schools of said Counties, together with a cross-transportation lottery program of busing black pupils from City to Counties and white pupils from Counties to City; all in order that every school in the consolidated system would have no more than a quota of 40% black pupils, nor less than a quota of 15% black pupils, to avoid the pitfalls of resegregation due to white exodus ("white flight"), and black tokenism, respectively. 338 F. Supp. at 194-195, 197, 244-248.

The Court of Appeals for the Fourth Circuit reversed the order of the District Court by a five-to-one (5-to-1) vote, *en banc*, 462 F.2d 1058. On January 15, 1973, this Court granted certiorari.

Summary of Argument

State action in all of the school systems affected by the consolidation and racial cross-busing decree of the District Court below had achieved full compliance with *Brown I;* therefore, the District Court lacked power and abused its discretion in decreeing its drastic racial quota pupil assignment program, especially since quotas themselves do not comport with the principle of equality of opportunity guaranteed by the Constitution. Therefore, the Court of Appeals for the Fourth Circuit below was correct in reversing the judgment of the District Court below.

ARGUMENT

POINT I

Having implemented a unitary desegregation plan previously ordered by the District Court, the school system of the City of Richmond became unitary and there was no basis for the tri-system school consolidation and cross-busing decree of the District Court below.

The threshold question in this case is the operation *vel non* of a unitary school system by the School Board of the City of Richmond by the time the District Court decreed its drastic remedy of tri-system school consolidation of the City schools with those of two neighboring Counties, together with cross-busing of pupils between City and Counties. There is, however, simply no allegation in the amended complaint (filed on December 14, 1970), nor any evidence, that any State action, subsequent to the 1970 District Court decision (317 F.Supp. 555), occurred to segregate any of the

schools in any of the defendant public school syste
cording to race. Thus, unless the concept of "u
status" is to be given the unprecedental meaning of a
majority pupil quota, or any other preconceived b
ratio of white pupils to black pupils in our public s
there is no basis for the drastic decree of the District
below, 338 F.Supp. at 244-248, particularly where t
fendant Richmond City School Board had already
mented a previously ordered desegregation plan.

As the Court of Appeals pointed out in this case

> "Indeed, it is virtually conceded and estal
> beyond question that, albeit belatedly, Richmond
> this juncture done all it can do to disestablish
> maximum extent possible the formerly state-i
> dual school system within its municipal boun
> *Bradley* below, 462 F. 2d at 1061.

Thus, the springboard for the tri-system-wide con
tion plan, *i.e.*, the supposed lack of unitary status
Richmond City school system, was totally absent fr
case. This Court has made it clear that, despite u
demography, at some point a previously dual school
"should have achieved full compliance with this
decision in *Brown I*" and that then the system
"unitary." *Swann* v. *Charlotte-Mecklenburg Bo*
Education, 402 U.S. 1, 31 (1971). Therefore, only
Court should find that "unitary" status had not b
tained in the Richmond public school system can the
of the District Court below be reinstated. For, o
affirmative duty to desegregate a school system ha
accomplished and racial discrimination *"through
action"* is eliminated from the system, then in the
of a showing that "either the *school authorities* o

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other *agency of the State* has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, *further intervention by a district court should not be necessary.*" *Swann, supra,* 402 U.S. at 31-32; emphasis added. Thus, once a school system achieves unitary status, it gets a fresh start, and judicial power to intervene is exhausted in the absence of further State action to resegregate the schools.

It appears, however, that *private* action in the City of Richmond, of the same pattern as in virtually every other city in America, did indeed contribute to the inability of the Richmond City school system to obtain a white majority pupil quota in every school in that system. Obviously, the white parents either removed their residence away from the City or exercised their constitutionally protected right to transfer their white children from the public to the private schools. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Such private action can and undoubtedly does occur even where there is no previous history of a dual school system. See: William K. Stevens, "How a School Tips From White to Black", *N.Y. Times,* November 6, 1972, p. 1, col. 1, quoting Dr. Thomas Pettigrew as stating (*id.* at p. 83, col. 5): "Tipping points are in people's heads, * * * One community's tipping point may be another community's stability, depending on the circumstances." And even if white parents flee the public school system, their attitudes, beliefs, and behavior are beyond any Federal judicial remedy under present law. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972); *Pierce* v. *Society of Sisters, supra; Wisconsin* v. *Yoder, supra.*

Careful and "nice distinctions"* must therefore be drawn between racial imbalance in public schools resulting from private white attrition from a school system, whose boundary has been set by racially neutral State action, as opposed to racial segregation caused by discriminatory State action. This Court itself has already set forth such distinctions in racial integration cases, for the promises of *Brown I* (347 U.S. 483) and *Brown II* (349 U.S. 294) extend only to those areas of State action under "law(s) requiring or permitting" segregation or discrimination according to race. *Brown I*, 347 U.S. at 488, 496; *Brown II*, 349 U.S. at 298.

While it is true that racially imbalanced housing contributes to the existence of racially imbalanced schools under a neighborhood school system, nevertheless, such racial imbalance in housing patterns occurs in virtually every city in this Nation. Dr. Karl Taeuber, "Residential Segregation", *Scientific American*, August 1965, p. 12; cited approvingly in the dissenting opinion in *Northcross* v. *Board of Education of Memphis*, 466 F.2d 890 at 897 (6 Cir. 1972; cert. den., 41 L.W. 3447). Moreover, this housing imbalance occurs through private action both black** and white regardless of local employment practices or civil rights policies. *Ibid.* And *Brown I* and *Brown II* did not purport to touch such social issues at all, for school desegregation cases "can carry only a limited amount of

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* *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 329 (1944).

** The fact that some blacks prefer to live in black neighborhoods, and that some blacks disapprove of the District Court's integration decree in this case as "paternalistic and patronizing" (462 F. 2d at 1063, fn.4), casts some doubt on the accuracy of the demographic analysis that blacks are "locked into urban school divisions" (Brief for Petitioners in No. 72-550) and raises the question as to the actual constituency of the class of black plaintiffs.

baggage." *Bradley* below, 462 F. 2d at 1066. The appropriate remedy for housing discrimination* lies outside the scope of a school case, in any event.

Thus, it appears that the same social dynamics, which are operative regardless of State action, were operative in the case at bar to defeat the ability of the Richmond City school system to achieve a white majority pupil quota in every school in that City. Yet the District Court below ordered the drastic and sweeping tri-system consolidation remedy in the absence of any evidence that State action was responsible for the inability of the City school system to achieve the white majority quota. Moreover, the tri-system-wide metropolitan consolidation plan together with the "lottery program" (338 F.Supp. at 187) of cross-busing solely of black pupils from City to Counties and solely of white pupils from Counties to City, all as decreed by the District Court below, hardly comports with the remedy of "a revision of school districts and attendance areas into *compact* units to achieve a system of determining admission to the public schools on a *nonracial* basis. *Brown II*, 349 U.S. at 300-301; emphasis added.

Due to a white exodus from the central City of Richmond, the type of phenomenon occurring all over the Nation, all previously ordered desegregation plans had failed to satisfy the District Court below in its quest for a white majority quota in every school. But surely the remedies flowing from the Equal Protection clause of section 1 of the Fourteenth Amendment do not extend to a case, even with a previous history of de jure segregation, where, as

* See: *Jones* v. *Albert H. Mayer & Co.*, 392 U.S. 409 (1968).

here, it has not been shown that "any person" is now being denied admission to any public school "solely on the basis of race." U.S. Const. Amend. XIV, sec. 1; *Brown I*, 347 U.S. at 493. For the Equal Protection clause creates individual rights, and not group quota rights, whether in employment opportunities, in any jury selection, or in education. *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950); *Carter* v. *Jury Commission*, 396 U.S. 320, 339 (1970); *Mapp* v. *Board of Education*, 41 L.W. 2207 (6 Cir. October 11, 1972). See also: *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971).

POINT II

The District Court lacked power to order the consolidation of the unitary school system of the City of Richmond with the unitary school systems of the neighboring counties to achieve a racial balance of pupils in all schools of all systems.

The slippery sociological concept of "racially identifiable schools"* (*Bradley* below, 338 F.Supp. at 79-80), the only purported evil in the case at bar, hardly constitutes a proper cause for the drastic remedy decreed by the District Court avowedly to secure a "viable racial mix" (338 F. Supp. at 186, fn. 22; 230) "plus positive interaction" (338 F.Supp. at 194) in all the public schools in the defendant school systems. For it has been well stated that:

> "The Constitution is intended to preserve practical and substantial rights, not to maintain theories."

* In a dual school system, however, this phrase may have a well-defined meaning as imparted by deliberate State action. See: *Green* v. *County School Bd.*, 391 U.S. 430, 442 (1968).

Faitoute Iron & Steel Co. v. *Asbury Park,* 316 U.S. 502 at 514 (1942)

l that:

"The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning." *Federal Housing Administration* v. *The Darlington,* 358 U.S. 84 at 91 (1958).

While it is true that the Congress has enacted such tutes as the Civil Rights Act of 1871 (42 U.S.C. 1983) l the Civil Rights Act of 1964 (42 U.S.C. 2000), the uity power of the federal judiciary is subject to the itation that its equity jurisdiction "depends upon legal igations, and its decrees, can only enforce remedies to extent and in the mode by law established." *Rees* v. *y of Watertown,* 86 U.S. (19 Wall.) 107, 121 (1874). t since there appears to be no legal basis for the legal igation of defendant public school systems, now unitary, operate racially non-identifiable schools (whatever that y mean from time to time), there simply is no constitunal violation to which any equitable remedy can attach.

Again it should be stressed that this case does not come hin *Brown.* "Never in that decision did it mandate or n hint at a concept in which the integration or lack of n any educational system should be judged by whether school population in each school was a percentage mirof the population in the general school area." "Secary Schools 1971-1972—Movement of Students to ieve Integration" in *Third Report of the Temporary mmission to Study the Causes of Campus Unrest*

("Academy or Battleground"), Albany, N.Y. (1972), Part I, Section II, p. 23 at p. 44.

Moreover, Congress has set forth a national policy in enacting 42 U.S.C. 2000c-6(a)(2) directly opposed to racial balancing in public schools by means of forced transportation of pupils, and this policy applies to every "de facto segregation" case. *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1, 17-18 (1971). Thus, the equitable remedies available to a federal district court, under the remedial section of the Civil Rights Act, 42 U.S.C. 1988, are correspondingly limited.

It should be noted, moreover, that section 5 of the Fourteenth Amendment enlarges only the enforcement power of the Congress, not the federal judiciary; and that "As broad as the congressional enforcement power is, it is not unlimited." *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970). Hence, there cannot possibly be any right of the plaintiff black school parents under the Constitution to have their children attend public schools having a "viable racial mix", "plus positive interaction" (whatever these may mean). 338 F.Supp. at 230, 194. And in the absence of such a constitutional right, there can be no violation of such right, and hence no occasion for the exercise of the equitable remedial powers of a district court. See: *Swann*, 402 U.S. at 15; see also: *Bulluck* v. *Washington*, 468 F. 2d 1096, 1105 (D.C. Cir., 1972).

POINT III

The Constitution guarantees equality of opportunity, and not equality of results.

There is no room in a unitary school system for judicial legislation of public school boundaries and for pupil quota assignments based upon race, all pursuant to a theory of "viable racial mix." Many years ago, this Court had occasion to pass on the evils of another racial quota scheme, that time in the area of employment opportunity. This Court then held that the States were free to ban all picketing designed to secure racial quota hiring practices. *Hughes v. Superior Court of California*, 339 U.S. 460 (1950). As Mr. Justice Frankfurter cogently reasoned in that case:

> "To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. States may well believe that such constitutional sheltering would inevitably encourage use of picketing to compel employment on the basis of racial discrimination. In disallowing such picketing States may act under the belief that otherwise community tensions and conflicts would be exacerbated. The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law." *Hughes*, 339 U.S. at 464.

It is easy to see that racial quotas mandated by law in our heterogeneous society cannot but quickly escalate into ethnic jealousies and conflicts. It is not difficult to foresee even political campaigns based upon the issue of racial quotas dignified by the District Court below. The very fabric of our society cannot tolerate the mischief inherent in any ethnic quotas, particularly those dignified by law. The only viable solution to the racial problems of our times was formulated long ago by Mr. Justice Harlan (senior), dissenting in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896):

> "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." *Plessy*, 163 U.S. 537, 554.

There must never be an abandonment of the constitutional principle of equality of opportunity, but without the interposition of quotas to secure equality of results. The District Court acted far in excess of its power and discretion in elevating the theory of "viable racial mix" or "optimum mix" (338 F.Supp. at 230, 194-195) into a constitutional right of plaintiff school children. For once a public school system is unitary, the governing constitutional principles must all be "color-blind." *Plessy* v. *Ferguson*, 163 U.S. at 559, dissenting opinion of Mr. Justice Harlan.

Conclusion

There being a complete lack of any showing that any person was being denied equal protection of the laws, the alleged constitutional violations found by the District Court below being based upon a pure theory of ethnic quota systems, and the drastic remedy of tri-system school district consolidation with racial cross-transportation of pupils being an abuse of equitable power and discretion; accordingly, the judgment of the Court of Appeals below should be affirmed and the amended complaint should be dismissed.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE CONGRESS OF RACIAL EQUALITY

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BRIEF AMICUS CURIAE FOR THE CONGRESS OF RACIAL EQUALITY

I.

CONSENT TO FILING

Consent to the Applicant's filing of a brief *amicus* has been obtained from all parties to this proceeding.[1]

[1] Applicant also sought permission from the parties in *Carolyn Bradley* v. *The State Board of Education*, No. 72-550. Counsel for Carolyn Bradley have not given permission in that case.

II.

INTEREST OF THE AMICUS

This brief is submitted by the Congress of Racial Equality (hereinafter re[illegible]red to as CORE), which is a national organization working for the eradication of every vestige of racial discrimination in American life. It was originally founded for this purpose thirty years ago, when a group of fellow Americans sought to apply Ghandian principles to the American racial situation.

The first action of this dedicated band of idealists took the form of a sit-in at a lunch counter in Chicago. The success of this action encouraged similar action in other areas, and CORE was soon on its way to becoming the major civil rights organization that it is today.

During its early period, CORE's direct action techniques were based on the concept that moral suasion alone could achieve the desired goal of the organization. The sit-in and the picket line thus became its hallmark, and its members became known for their courage, their tough idealism, and their willingness to undertake any project in the interest of justice no matter what risks might result to their persons.

In Richmond, part of the educational system affected by the present proceedings, CORE became involved at the request of many Black parents who are distressed by the failure of the schools their children attend to provide adequate education. Even if the District Court's order does not work disastrous consequences to Black children by their being uprooted and placed in schools where estrangement may be their only find, as countless Black parents expect, the District Court's decree offers little promise for the educational advantages they seek.

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CORE's National Council has spent a substantial amount of time in studying available documents in the instant case, including petitions for writs of certiorari by the Richmond School Board and Carolyn Bradley, et al., and their respective briefs on the appeal before the United States Court of Appeals for the Fourth Circuit. CORE further believes, on the basis of this examination, that questions of law relevant to and important for resolving the issues herein will not be adequately covered in either the respondents' or petitioners' briefs.

It is the position of *amicus* that neither the Fourteenth Amendment nor the desegregation cases foreclose judicial cognizance of the remedial alternative to racial mix-via-busing herein proposed.

A reassessment of its programs in the mid-1960's indicated to the organization that it had been consistently and decidedly rebuffed in its assaults on discrimination in housing and education. It became apparent that new strategies would have to be devised to deal with the entrenched nature of discrimination and racism in those areas affected.

Aside from its obvious importance in the quest for equality, education was seen as the area to which new strategies could most feasibly and profitably be applied. The organization has therefore concentrated a major portion of its resources in the field of education over the past number of years. Its concern and its programs in this area as well as its long support for *Brown* v. *Board of Education*, 347 U.S. 483 (1954), are a matter of public record. CORE has fully supported the mandate of *Brown*, as evidenced by its involvement in various court cases. Its deep involvement in *Carter* v. *West Feliciana Parish Board of Education*, 396 U.S. 290 (1970), for example, is an indication of how persistent its involvement in education has been. CORE has

never been dogmatic about the *means* of obtaining its goal of equality for all Americans.

CORE members are agreed that the interest of the aggrieved individuals, who were the victims of years of segregation should not be ignored when changes are effected, and that such individuals should not be foreclosed from proposing future remedies designed to provide equality in such unitary school districts as may result in part or all racially identifiable schools within a given district.

CORE respectfully submits that, where a school system is restructured by a local board of education in a manner, as approved by the court, so as to comply with the mandate of *Brown,* any subsequent effort at consolidation of unitary school systems, merely for the purpose of achieving a so-called "viable racial mix," results in irreparable injury to Blacks. Any plan, which effectively destroys the opportunity for Blacks to have a hand in controlling their schools, results in a total loss of their culture and traditions which they seek to maintain.

We ask this Court to take judicial notice of similar problems, of denial of due process, which would result by a reversal of the Court of Appeals' decision herein. Any view which suggests that an education system cannot work if it is composed of a majority of Blacks should not become the standard established by this Court. It is for this reason, therefore, that we file this brief *amicus.*

III.

SUMMARY OF ARGUMENT

1. Having adopted unitary school systems in the three systems in question, which effected the disestablishment of dual schools in these jurisdictions, both the letter and spirit

of each board's actions in the three systems in question indicate full compliance with *Brown I*. In the absence of invidious state action, or other constitutional violation, the District Court lacked authority to order the consolidation of the Richmond, Henrico and Chesterfield school systems.

2. Theoretical testimony which suggests that no educational system will work if it is "majority black" is strongly racist and should be ignored by a federal court, especially when such testimony is sought to be used as a basis for disenfranchising Black residents, since Blacks would be permanently prevented from achieving control of a school system in which they are the majority and, as a result, denied due process as guaranteed by the Constitution.

IV.

ARGUMENT

The Constitution does not permit a federal court to order the consolidation of unitary school districts merely for the purpose of establishing a so-called "viable racial mix", in the absence of a clear showing that systematic or invidious discrimination permeates a system as a whole and thereby affects its operation.

A.

The Richmond School System Is Not Characterized By Racial Exclusively Or White Power Monopoly.

This brief strongly supports the judicial holding that there must be a unitary school system within every school district, *Alexander* v. *Holmes County Board*, 396 U.S. 19 (1969). We respectfully suggest that it would aid the resolution of the problem confronting the Court in *Brown* and still confronting it today to define the "unitary and dual systems"

in the context of the true nature of the public educational establishment.

A dual school system may be defined as the case where, overtly or covertly, in one state school district one board of education maintains control of two school systems with racial exclusivity. The Court has correctly declared that a unitary system is the antithesis of a dual school system.

In this case, we agree with the conclusion of Dr. Clifford P. Hooker, who testified as follows:

> "The witness: A public school is desegregated, in my opinion, when it excludes no one because of race, religion or national heritage.
>
> "The Court: . . . I take it your position is that Richmond doesn't need any desegregation, is that correct under your definition of it?
>
> "The witness: Under my definition the Richmond schools are presently desegregated.
>
> "The Court: All right." (A. 1194a, 1195a.)

The dual (segregated) system must be viewed not simply in terms of spatial relationships, but primarily in light of existing socio-econo-political dynamics.

The problem is not *simply* that Blacks and Whites attend different schools. A look at dual (segregated) school systems, whether *de jure* or *de facto*, will show that they generally have, aside from attendance of White and Black pupils at different schools, three common characteristics which make segregation the obnoxious and unconstitutional system that it is.

The first of these is that Whites set Blacks apart, by law or in fact, without their choice or consent. This constitutes the arbitrary imposition of authority from without. The act of

Whites telling Blacks what schools they can or cannot attend stigmatizes Blacks and imposes intolerable restraints on their constitutional rights. Measured by this factor, Richmond is not a dual school system.

Secondly, the local school board, usually all White or predominantly White, exercises control over both White and Black schools and favors the White schools. The school board enjoys a more intimate relationship with the White community and White parents than it does with the Black community and Black parents. It is more sensitive to their problems, their needs and aspirations than it is to those of Blacks. This deprives Black educators and pupils of much-needed support from the policy makers and managers of the schools and literally guarantees the failure of the Black school to achieve excellence in education.

A positive relationship between parents and those who govern the school is one of the most important factors affecting the quality of schools. Under segregation, Black parents have not enjoyed that kind of relationship. Richmond now has three Black members on its local Board of Education, one of whom is Chairman, and four Whites. CORE hopes and expects that the situation will further improve. By a consolidation, however, the voice and authority of the black members will be substantially diluted.

Finally, in a segregated system the local school board consistently deprives Black schools of resources. The money allotted by law to each and every school district when received by the local board is directed as the local board sees fit. Traditionally, part of the money intended for Black schools has been directed by the local board to White schools. Under this standard, Richmond is a unitary system. Nearly all Richmond schools have a Black majority,

ergo, no discrimination exists against Blacks in the expenditure of money for education.

Thus, it is the local school board, the dispenser *and* regulator of money, rewards, good will, and other benefits—"tangible" and "intangible"—which makes Black schools inferior. Under segregation, Blacks have been locked into a system over which they exercise no control, for which they have no responsibility and with respect to which they are powerless to effect meaningful change. In Richmond, Blacks are now gaining a position in which they are able to exercise control and responsibility. CORE hopes that the situation will further improve. However, in a consolidated school division in which each school has a majority White student body Blacks' opportunity for control and responsibility will be greatly minimized if not totally lost.

When segregation is placed in its proper context and defined in terms of who manages and controls the schools, it becomes apparent that the chief characteristic of a segregated school system—the imposition of oppressive outside authority—makes *de facto* dual systems in one district no less unconstitutional than formerly *de jure* dual systems in that district.

In light of this construction, how should different "communities of educational interest" satisfy their legitimate educational needs? Should that process be subject to equal protection? Does not this construction bear implications as to what constitutes a non-discriminatory, non-exclusionary unitary school system? Does this not suggest the need for internal restructuring, not of the "branches"—the Black schools, but of the "root"—the districts and the school boards, which represent the needs of the majority "community of educational interest."

CORE feels that it is patently clear that the surest measure of how much Blacks can trust any school system to give their children an education equal to that of Whites is how much actual—not illusory—opportunity to effect change and elicit responsiveness from that system exists. Does this not suggest that whatever is proposed to replace segregation must be measured also in terms of how much control is held by the Black community itself. This is a necessary guide to determining the potential success of any proposed means of desegregation.

To summarize, two critical elements of the dual or segregated system *de facto* or *de jure* are: (1) racial exclusivity and (2) white power monopoly. The proposed consolidation of the Richmond schools would enhance both racial exclusivity and white power monopoly. In light of this, does the District Court's order in the instant case offer effective relief against these two critical elements of segregation? The answer is, indeed, negative.

The District Court's Order fails to recognize the following requirements, if Blacks are to be offered equal protection under the Fourteenth Amendment:

1. The fact that Blacks are a valid special-interest group with needs that are unique.

2. The fact that wherever there exists a sizeable Black community, Blacks constitute a "community of educational interest."

3. The fact that Black communities are increasingly and ever more clearly demanding the opportunity to fulfill their educational interest and not have them always subordinated to the White "community of educational interest."

4. The fact that equal education implies more than just sharing equal physical space with Whites in the same classroom, with the same teacher, or sharing the same principal. Equal education further implies opportunity equal to Whites to structure curriculum, equal access to all available resoures, and equal access to and equal representation among school policy makers and managers.

5. The fact that an integrated setting can be as potentially damaging psychologically as a segregated setting is amply supported by a growing body of scientific data.

In Christopher Jenck's *Inequality: A Reassessment of the Effect of Family and Schooling in America*, (New York: Basic Books, Inc., Publishers), 1972, pp. 40-41, the author states:

> "In a community where the school administration believes in desegregated schooling and encourages black parents to attend desegregated schools, such a system could produce dramatic changes in *attendance* patterns. The 'liberal' alternative, which is widely viewed as the road to racial equality, seems to be compulsory busing of blacks to white neighborhoods and vice versa. This implies that black parents cannot send their children to all-black schools, even if they want to, because all-black schools are *by definition* inferior. This position strikes us as both *racist and politically unworkable over the long haul.*" (Emphasis added.)

The so-called "viable racial mix" concept, the objective of which is effected through the joinder proposed by the school board of the City of Richmond, is reflective of the notion that Black schools are by definition inferior.

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B.

Racial Mix Should Not Be Held To Be the Sole Means Of Fulfilling the Constitutional Requirement.

ARGUMENTS MADE IN SUPPORT OF A CONSTITUTIONAL REQUIREMENT OF RACIAL MIX IN THE SCHOOLS ARE FALLACIOUS.

Distinction between what is required by the Constitution d desirable as a matter of policy must be maintained. hat is unconstitutional is not the clustering together of ople, whether voluntarily or as a result of the workings of personal social factors, but the forced separation of people the state along racial, or even ethnic or religious, lines or idious discrimination imposed upon people by the state the basis of differences in their social, economic, and litical conditions.

Another contention that is made in support of the propo-on that the Constitution requires racial dispersal begins th the remark by this Court in *Brown* that racial segrega-n in the schools results in inherently unequal educational portunities. This statement, it is said, has been subse-ently substantiated by the Coleman Report, which shows inequality in educational opportunities whenever there is ced racial separation in the schools, whether the separa-n is imposed by law as segregation or not.

But the remark of the Court in *Brown* must be understood context. The Court found legally segregated education to inherently unequal, because it imposed a stigma and be-use, in dual school systems which result from it, the Black rt of the system was, overtly or covertly, but always sys-natically, short-changed. As for the Coleman Report, data show a measurable, if not a very substantial, im-vement in the education of Black children in "integrated" opposed to forced racially separated (segregated) situa-

tions. But whether what was measured was a difference between the education of Black children in one and the other situation, or a difference between the learning capacity of middle-class as opposed to lower-class Black children in a particular kind of learning experience is uncertain.

The Coleman Report hints at an important observation that change in a school ("community of educational interest") caused by a shift in the student population of more than 30 percent results in a decrease in the general educational performance of the students in that school. One can assume that "community of educational interest" can absorb a limited amount of change before it becomes unstable. Also, that stability of an "educational community of interest" is a factor in educational achievement. If a new look at Coleman's data and additional research can support this theory, then: what are the implications for movement toward racial mix as opposed to movement toward community control of schools—both non-discriminatory, non-racially exclusive—when and where there exists a choice? Is there a link between the failure of Black schools under segregation and the fact that the Black community doesn't control their schools? Shouldn't social scientists explore further Coleman's suggestion that pupils learn in proportion to their feeling of security and control over their environment?

(2) Any Argument That Racial Mix Is A Constitutional Requirement Suggests The Legitimation Of The Inferior Status Of Blacks.

In 1954, the Court in *Brown* held that segregation of schools when mandated by law created conditions which made the education obtained by Black children "inherently" unequal. The correctness of that ruling is not at issue. Clearly, the stigma which attaches when invidious manda-

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tory discrimination is imposed is one which creates scars which are impossible to remove. It is one thing, however, to proscribe legal segregation and its effects, and another to require racial mix as a constitutional command.

To argue that a school in which the vast majority of children are Black—where this condition did not arise by invidious operation of law—is by its very nature inferior, is to validate the very condition which *Brown* sought to remove. Such an approach suggests that only when Blacks are in the presence of Whites can they be truly equal. This approach—at the very least—implies that Black children cannot prosper educationally even if all other conditions are truly on a par with those prevailing in White schools. Of course, to be truly on par, each group would have to control its educational environment.

Voluntary separation and separation arising out of the operation of market forces are not the same thing as enforced separation. There is no evidence to the effect that an inferior education must by necessity result from the former one.

(3) Establishment Of A Constitutional Requirement Of Racial Mix In The Public Schools Would Foreclose Other Developments In The Evolution Of Public School Education Which Might Prove Desirable From An Educational Point Of View As Well As For Other Reasons.

Though the word is overused, it is fair to say that the public schools in the United States are in crisis. At any rate, they are, like so much else, in ferment, and ready for many changes and reforms.

Over the past few decades in many parts of the country, there has been structurally a movement toward consolidation, toward enlargement and centralization of school sys-

tems, rendering them less and less subject to the control of, and more and more removed from, the community and the family. But a counter trend is now also in being, toward control of schools in relatively much smaller districts by cohesive, concerned communities. Such communities should be self-defining, strictly on a voluntary basis, so that any family not wishing to form part of the community must be free to transfer its children out to other schools without having to move physically, and of course they may not be coercively formed by the state along racial, or ethnic, or even socio-economic lines.

When these communities exist, they must rest on the principle of voluntarism. But a trend toward community control of schools under the conditions mentioned is clearly visible, and in the judgment of many qualified observers may have highly beneficial educational results, as well as broader desirable consequences by contributing to other self-reliant and constructive community activities. (One aspect of this trend to community control is represented by the voucher plan which the Office of Economic Development has launched on an experimental basis.) Clearly, the consolidation plan in question here is a movement toward centralization and enlargement and away from community control.

Establishment of a constitutional requirement of racial mix would foreclose any further development of the community-control idea, and of many other possibly desirable options in the reorganization and reform of public school education. To begin with, the effort to abide by the requirement of racial mix on a nationwide basis would surely absorb all possible resources—material, political and of all other descriptions—available to the public schools, for it would be an effort of unprecedented proportions. Secondly,

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racial mix could only be accomplished through more and more consolidation of school systems and centralization of control over them. Inevitably it would constitute a choice of one option to the exclusion of other ones.

We do not remotely know enough about how best to solve the problem of our schools to do that—to put the force of the Constitution behind one objective, one technique, to the exclusion of other ones. This Court should decline to impose a requirement of racial mix, unless in a particular situation there is no other means of satisfying the constitutional end of equality.

We are confronted here with a many-faceted problem to which one definitive solution has not been found. The Court has in the past been sympathetic to the desire of local areas to develop new approaches to difficult problems. We hope the Court will extend that sympathy to the desire of local Black communities to develop their own means of achieving the constitutionally mandated ends. The proposed Richmond school consolidation would interfere with that achievement.

V.

CONCLUSION

We respectfully submit that the findings indicate that:

1. When racial mix is the only means, or most "effective" means, to bring about at "the earliest practicable date" the Court-ordered end, a unitary system in a district, then it is mandated, but this is not necessary in Richmond.

2. In any event, the Constitution does not mandate that unitary school districts be consolidated to accommodate

the so-called viable racial mix concept as suggested by Petitioner in this case.

We pray that this Court affirm the judgment of the Court of Appeals and remand this case to the lower court to permit other aggrieved citizens of Richmond to petition for that plan that can best meet the test of "good faith compliance," "effectiveness" and "earliest practicable date" (*Brown II*) in their quest for their constitutional rights in the City of Richmond.

Respectfully submitted,

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